### STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 97B078

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**GAYLENE HARVEY,** 

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, COLORADO WOMEN'S CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was convened on November 3, 1997 and concluded, after seven days of evidentiary hearings, with the filing of the parties' written closing arguments, on April 10, 1998 in Denver, CO. Complainant, Gaylene Harvey, was present at the hearing and represented by William S. Finger, Attorney at Law. Respondent appeared at hearing through Diane Michaud, Assistant Attorney General.

#### **ISSUES PRESENTED**

The following issues were presented for consideration:

- 1. whether Complainant engaged in the conduct for which discipline was imposed;
- 2. whether the conduct proven to have occurred constitutes a failure to comply with standards of efficient service and competence and willful misconduct, including violation of the Department of Corrections' Administrative Regulations 1450-1 and 1450-36;
- 3. whether the decision to terminate Complainant's employment was arbitrary, capricious, or contrary to rule or law;
- 4. whether Mike Williams, Superintendent of Colorado Women's Correctional Facility, was the duly delegated appointing authority; and
- 5. whether the Department of Corrections' failure to adopt Administrative Regulations 1450-1 and 1450-36 pursuant to the Administrative Procedures Act causes the

termination action taken against Complainant to be void.

#### **FINDINGS OF FACT**

Based on all the evidence presented at the hearing, the following Findings of Fact and Conclusions of Law are entered:

- 1. Gaylene Harvey (the Complainant or Harvey) was employed by the Department of Corrections (Department) on October 22, 1979. Her employment was terminated on December 3, 1996 for failure to comply with standards of efficient service and competence and willful misconduct, including violation of the Department's Administrative Regulations (AR) 1450.1 and 1450.36. AR 1450-1 and 1450-36 were not adopted in accordance with the Administrative Procedures Act pertaining to rulemaking.
- 2. In her position as a Correctional Officer for the Department, Harvey was selected for random drug testing on October 9, 1996. Harvey tested positive for amphetamines and methamphetamines. Harvey met with Mike Williams (Williams), the Superintendent of the Colorado Women's Correctional Facility (CWCF), for a R8-3-3 meeting on November 18, 1996. Thereafter, on December 3, 1996, she was provided notice that her employment was terminated.
- 3. Harvey grew up in Canon City, CO. Her father was a Correctional Officer. She has been married for 15 years and was employed by the Department for 17 years and two months. Harvey began her employment with the Department as a Clerk Typist. In June 1983, she became a Correctional Officer. Harvey was assigned to the Skyline Correctional Facility and CWCF during her employment with the Department. Throughout Harvey's employment, she received "standard" or better job performance ratings. Coworkers and supervisors who worked with her over an extended period of time observed Harvey to be a competent employee.
- 4. Harvey enthusiastically takes vitamin supplements on a daily basis. She also drinks herbal teas. Harvey takes two dietary supplements, Excel and Mini Thins. These are sold without a prescription. They contain ephedrine. Ephedrine is not classified as a narcotic, and its chemical make up is distinct from amphetamine and methamphetamine.
- 5. Kay Bevens (Bevens) is employed by the Department as an Administrative Assistant. She has been employed by the Department for 11 years. Bevens is a single parent. She has one son who was approximately 20 years old in October 1996. Prior to October 1996, Bevens and Harvey were best friends. Their friendship lasted 20 years. Harvey, Bevens, Harvey's husband, and Bevens' son had dinner together three to four times per week. Bevens was viewed as being like an older sister to Harvey.
- 6. On occasions when Bevens went out of town or was hospitalized for illness, Harvey and her husband were sitters for Bevens' son. When Bevens' son attended college,

Harvey and her husband provided financial and emotional support to the youth.

- 7. Subsequent to October 9, 1996, when Harvey provided a urine sample, Bevens learned that Harvey had a sexual relationship with her son beginning when the youth was in high school. During the course of Harvey's relationship with Bevens' son, Harvey admitted to the youth that she used illegal drugs.
- 8. In October 1996, the Department initiated a random drug testing program for the Department's employees. A computer program which made random selections of employees to be drug tested selected Harvey for drug testing. On October 9, 1996, Bevens was assigned to contact, escort, and to receive the urine sample from Harvey.
- 9. On October 9, 1996, Harvey had difficulty urinating. She took in excess of 60 minutes to void and provide the sample to Bevens. Harvey's social security number and thumb print were placed on two container which held her urine samples. The containers were sealed with a tamper proof seal.
- 10. The urine was stored in a locked refrigerator at CWCF until October 16, 1996. On this date, Dennis Houghnon, an Investigator with the Department's Inspector General's Office, picked up Harvey's urine sample, along with other urine samples, and transported them to the Department's central offices in Colorado Springs for testing.
- 11. The urine sample was tested initially by Department personnel using the Inamunoassay (EMIT) technology. Harvey's test results were positive for amphetamines. On October 23, 1996, Harvey's urine sample was sent to PharmChem Laboratories in California for confirmatory analysis through Gas Chromatography Mass Spectrometry (GCMS) technology. The GCMS test confirmed that Harvey's urine was positive for amphetamine and methamphetamine.
- 12. Carol Gomez, an Administrative Assistant employed by the Department, and AR 1450-1, which makes it improper to illegally possess, manufacture, use, sale, or transfer a controlled substance. Williams further concluded that Harvey's conduct constituted a failure to comply with standards of efficient service and competence. Williams decided to terminate Harvey's employment with the Department.
- 20. As a Correctional Officer, Harvey was expected to guard inmates in a correctional facility. The Correctional Officer position is considered a safety sensitive position at the Department for which random drug testing is permitted. Harvey was aware of the Department's prohibition against the illegal use of controlled substances by its staff. Occasionally, Harvey was expected to appeared in proceedings within the correctional facility pertaining to inmate violations of the Code of Penal Discipline. In these proceedings, Harvey was expected to offer testimony about inmate conduct which could result in the further deprivation of inmate liberties. Some of these proceedings pertain to the inmates' illicit drug activity. Occasionally, a Correctional Officer might be required to testify in courts of law

concerning matters that occur in the line of his/her duties.

- 21. Williams determined that the discovery that Harvey uses amphetamine and methamphetamine could compromise her position as a Correctional Officer and as a witness in legal proceedings.
- 22. John J. Perko was the Division Director of Adult Services for the Department during the relevant period in this matter, October through December 1996. He took a one year leave of absence due to illness. At the end of the one year leave, he retired from his position in the Department.
- 23. By memorandum dated February 28, 1996, in anticipation of Perko's departure from the work place, Perko delegated appointing authority to Jerry Gasko who was then the Director of Staff for Correctional Services. Perko also delegated appointing authority to Carl Zenon and other top managers.
- 24. Following Perko's departure from work on leave of absence, Executive Director Aristedes Zavaras decided to rescind the appointing authority granted by Perko in his February 28, 1996 memorandum. By memorandum dated April 29, 1996, Zavaras appointed Gasko Acting Division Director of Adult Services. Gasko testified at hearing that he was aware that Harvey tested positive for illegal drugs in October 1996 and that he orally delegated appointing authority to Carl Zenon, the Western Regional Director, to act in the matter. Gasko also testified that he was aware of Williams' decision to terminate Harvey's employment. He testified that he concurred in the decision and took no action to countermand the decision.
- 25. On November 14, 1996, Zavaras determined that there was a need to change the Department's reporting structure. Zavaras delegated appointing authority to Robert Cantwell, the Inspector General, over all personnel matters arising out of investigations conducted by the Inspector General's office. The November 14, 1998 delegation gave Cantwell authority to further delegate his authority.
- 26. By memorandum dated November 8, 1996, Williams requested appointing authority to act in this matter from Carl Zenon. Carl Zenon delegated appointing authority in this matter to Williams on November 12, 1996. On November 14, 1996, Robert Cantwell, the Inspector General, notified Williams that the Inspector General's Office concluded its investigation into the Harvey matter. Cantwell advised Williams that he was delegated appointing authority to take disciplinary action in this matter.

#### **CONCLUSIONS OF LAW**

1. Respondent established by a preponderance of the evidence that Complainant engaged in the conduct for which discipline was imposed, that the conduct constitutes a failure to comply with standards of efficient service, and that the decision to terminate her employment was neither arbitrary, capricious, nor contrary to

#### rule or law.

Complainant contends that Respondent failed to establish that she illegally used controlled substances and it failed to establish evidence at hearing that she did not comply with standards of efficient service and competence. Complainant argues that all the witnesses who testified at hearing about her job performance testified that she was an employee who met standards of efficient service and competence. Complainant maintains that because Respondent did not sustain its burden of proof the decision to terminate her employment is arbitrary, capricious, and contrary to rule and law.

Respondent maintains that it presented sufficient evidence from which to conclude that Complainant was responsible for her actions in testing positive for amphetamine and methamphetamine, that this conduct constitutes a failure to comply with standards of efficient service and competence, and that the decision to terminate her employment is sustainable.

This case involves a myriad of details about Complainant's misconduct, appointing authority, chain of custody of the urine sample, and about Complainant's relationships with a co-worker and her family. The parties advocated strongly for their respective positions. In the final analysis, at least the final analysis by the undersigned, this case boils down to the fact that Complainant held a safety sensitive position, she was randomly drug tested, ;he tested positive for prohibited substances, and Complainant's employment was properly terminated.

This conclusion is reached after careful consideration of all the evidence presented at hearing. Complainant's arguments in support of her position that the termination was arbitrary, capricious, and contrary to rule and law were considered and determined to be without merit. Complainant made assertions regarding Kay Bevens' motivation to taint the urine sample, with regard to Carol Gomez' careless handling of the paperwork for the urine sample, and with regard to the question whether Complainant intended to illegally ingest a controlled substance. These assertions were considered and determined to be unpersuasive on the issue of the propriety of Respondent's action.

Individuals employed in safety sensitive positions, such as Complainant was employed in as a correctional officer, can be terminated upon the discovery through random drug testing of drug usage. In this case, Complainant's contention that she did not use drugs was deemed not credible. Relying on the credible evidence presented at hearing, and reasonable inferences that could be drawn from that evidence, it is concluded that Complainant used controlled substances in or around October 9, 1996. The use of drugs by a correctional officer constitutes a failure to comply with standards of efficient service and competence because of the job duties of the position. Evidence presented at hearing that Complainant was observed by coworkers and supervisors to be a competent employee does not preclude the finding of inefficient service and incompetence upon the discovery of illegal drug use by Complainant.

## 2. <u>The Department established by a preponderance of the evidence that Complainant engaged in willful misconduct.</u>

Complainant contends that Respondent was required to establish that she intended to ingest controlled substances in order to establish willful misconduct in this matter. Complainant further maintains that the evidence presented at hearing failed to establish that she violated AR 1450-1 and 1450-36 therefore it is argued that there can be no finding of willful misconduct. Finally, Complainant contends that the Department's ARs were not adopted in conformity with the Administrative Procedures Act and therefore action taken against her under these rules is null and void.

Respondent contends that it sustained its burden of proof to establish that Complainant acted willfully in testing positive for controlled substances. Respondent further contends that the Department's ARs were properly adopted and applied in this matter.

The weight of the credible evidence in this matter established that Complainant was responsible for the positive test result for controlled substances in October 1996 because she knowing used the illegal drugs for which she tested positive. Therefore, it is found that she engaged in willful misconduct. It is further concluded that Complainant violated AR 1450-1 by violating the prohibition against the illegal use of controlled substances.

The ARs are found in this matter to be guides for the conduct of business in the Department and therefore are effective to place employees on notice of the Department's job performance expectations. Evidence established that Complainant was aware of the prohibitions contained in AR 1450-1 against the illegal use of controlled substances. Therefore, her use of amphetamine and methamphetamine in or around October 1996 can be found to be willful misconduct providing a basis for the termination of her employment.

# 3. <u>Mike Williams, Superintendent of CWCF. was the duly delegated appointing authority for the imposition of disciplinary action in this matter.</u>

Complainant contends that Williams lacked authority to impose disciplinary action in this matter and therefore the action taken terminating her employment is void. Complainant asserts that John J. Perko, Division Director of Adult Services, was the appointing authority for Complainant's position. Complainant contends that there is no evidence that Perko delegated appointing authority to Williams to act in this matter consistent with the provisions of Art. XII, Sec. 13(7) of the Colorado Constitution.

Respondent contends that Williams was delegated appointing authority by Jerry Gasko, Carl Zenon, and Robert Cantwell to act in this matter. Respondent maintains that there is no basis to find Williams' action terminating Complainant's employment void for lack of proper delegation of authority.

The evidence presented at hearing established a convoluted array of facts concerning the delegation of appointing authority. However, the bottom line is that Williams was delegated appointing authority by Jerry Gasko and Robert Cantwell. The evidence established that in Perko's absence Aristedes Zavaras appointed Gasko Acting Division Director of Adult Services. The evidence further established that Gasko, as Acting Division Director, orally delegated appointing authority to Carl Zenon. Additionally, the evidence showed that Gasko had knowledge of the action taken by Williams in December 1996 and took no action to countermand it.

No error can be found in Perko's position being filled by Zavaras on an acting basis during his leave of absence. Zavaras' appointment of Gasko as Acting Division Director is a permissible exercise of authority under Art. XII, Sec. 13(7) and Section 17-20-102(3), C.R.S. (1997). In the acting capacity, Gasko had authority to act as Division Director of Adult Services.

It is acknowledged that there are conflicting statutory provisions concerning the authority of the Executive Director of the Department. However, under Section 17-20-102(3), it is within Zavaras' authority to grant appointing authority to Inspector General Robert Cantwell in matters resulting from investigations conducted by his office. Therefore, Cantwell's delegation of authority to Williams by memorandum dated November 14, 1996 also conferred authority on Williams to act in this matter.

#### **ORDER**

The action of the Department is affirmed and the	ne appeal is dismissed v	with prejudice.
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Dated this Day of June 1998.	
	MARGOT W. JONES
	Administrative Law Judge

### **NOTICE OF APPEAL RIGHTS**

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), IOA C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal. must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti V. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 1OA C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either' by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-1 0-5, 4 CCR 801-1.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-i. Requests for oral argument are seldom granted.

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### **CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of June, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

William S. Finger Attorney at Law 29025-D Upper Bear Creek Road Post Office Box 1477 Evergreen, CO 80437-i477

and through inter agency mail, addressed as follows,

Diane Michaud Assistant Attorney General 1525 Sherman St., 5th Floor Denver, CO 80203